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No. 73-5677

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

MAURICE SCHICK, *Petitioner,*

v.

GEORGE J. REED, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT

I. The Government's Argument That Furman v. Georgia Does Not Invalidate the No-Parole Provision of Petitioner's Commuted Sentence Is Erroneous

In their brief respondents raise a major new constitutional argument. Although they did not do so in their brief or their oral argument at the Court of Appeals or in their opposition to the petition for certiorari, respondents now question, for the first time, the applicability of *Furman* v. *Georgia,* 408 U.S. 238,

rehearing denied, 409 U.S. 902 (1972), to the military. As we read respondents' brief, this is now their principal defense to the argument that the no-parole provision of petitioner's commuted sentence is invalid under *Furman.*

Based as it is on the historical separateness of military jurisprudence, this argument is inextricably related to the larger question of the applicability of the Bill of Rights to the military generally. Because, for this reason, the implications of respondents' newly formulated argument are so far-reaching, and because that argument is squarely contrary to the full body of precedents developed by both civilian and military federal courts over several decades, it is addressed in some detail below.

A. The Eighth Amendment Prohibition Against Cruel and Unusual Punishments Applies With Full Force to the Military.

The government's new contention that the Eighth Amendment prohibition against cruel and unusual punishments, as explicated in *Furman* v. *Georgia,* does not apply to the military is inconsistent with (1) this Court's opinions in *Furman* v. *Georgia* itself, (2) decisions by both military and civilian courts, including this Court, applying the Eighth Amendment prohibition against cruel and unusual punishments to the military, and (3) the body of precedents, civilian and military, applying the principle that the Bill of Rights is applicable to the military except where expressly or necessarily inapplicable. A decision adopting the argument the government here makes would stand in direct contrast to the entire pattern of development of modern military law since the enactment of the Uniform Code of Military Justice in 1950. Moreover, the conclusory grounds on which respondents suggest that this Court take such a step are demonstrably erroneous.

First, respondents' assertion that *Furman* v. *Georgia* is inapplicable to the military is contradicted by the Court's opinion in *Furman* itself. The Court's *per curiam* decision makes no exception for federal statutes that apply to the military. Also, Mr. Justice Stewart lists in his separate opinion four American capital punishment statutes *not* affected by the Court's decision, but does not include in that list the federal statutes affecting the military. 408 U.S. at 307. Even more conclusive, the Court's dissenters specifically note that the Court's holding strikes down death penalty provisions of the Uniform Code of Military Justice. Mr. Justice Powell, with whom the other three dissenters joined, stated that "numerous provisions of . . . the Uniform Code of Military Justice also are voided." 408 U.S. at 417-418.

Second, both civilian and military federal courts have made clear that the Eighth Amendment prohibition against cruel and unusual punishments applies to the military. Conclusive on this point is *Trop* v. *Dulles,* 356 U.S. 86 (1958), in which the Supreme Court applied the Eighth Amendment provision against cruel and unusual punishments to a statute which imposed additional sanctions on servicemen convicted of wartime desertion. At issue was section 401(g) of the Nationality Act of 1940, which provided that persons convicted of desertion during wartime and sentenced to dismissal or discharge would lose their citizenship. Although the Court was divided on whether the statute was penal and whether it was unconstitutionally cruel and unusual, there was no disagreement on the applicability of the Eighth Amendment to the military. Moreover, the Court's ruling was unaffected by the fact that—as respondents allege

is here the case—the punishment was enacted in "response to the needs of the military in maintaining discipline in the armed forces, especially during wartime." *Id.*, at 107 (Brennan, J., concurring). Thus, *Trop* v. *Dulles* is alone dispositive of the government's claim. As numerous other cases indicate, however, it is only a part of the substantial body of law with which the government's new contention is incompatible.

Lower federal civilian courts have also applied the Eighth Amendment cruel and unusual punishments standard to the military in a number of cases. *E.g., Powers* v. *Hunter,* 178 F.2d 141, 145 (10th Cir. 1949), *cert. denied,* 339 U.S. 986, *rehearing denied,* 340 U.S. 847 (1950); *Easley* v. *Hunter,* 209 F.2d 483, 486 (10th Cir. 1953); *Benjamin* v. *Hunter,* 169 F.2d 512 (10th Cir. 1948). *See also* cases holding that activation of delinquent military reservists does not violate Eighth Amendment ban on cruel and unusual punishment, *e.g., Caruso* v. *Toothaker,* 331 F. Supp. 294, 302 (M.D. Pa. 1971); *Mickey* v. *Barclay,* 328 F.Supp. 1108 (E.D. Pa. 1971).

Moreover, military courts, citing both the Eighth Amendment of the Constitution and Article 55 (10 U.S.C. § 855) of the Uniform Code of Military Justice (UCMJ), have followed civilian standards and ruled that the military may not impose cruel and unusual punishments. In *United States* v. *Jobe,* 10 USCMA 276, 279, 27 CMR 350, 353 (1959), the U.S. Court of Military Appeals (USCMA) stated that "a court-martial cannot impose 'cruel or unusual punishment,' " citing Article 55 of the Code, and noted, citing *Trop* v. *Dulles,* that the punishment in question might violate that standard. In 1967 in *United States* v. *Tem-*

pia, 16 USCMA 629, 37 CMR 249 (1967), Judge Kilday, emphasizing the point that constitutional decisions of the Supreme Court are binding on military courts (*see* p. 10, *infra*), noted that federal courts frequently review military decisions through collateral attack. Among the issues so reviewable, he observed, is whether "a sentence was so severe as to offend against the constitutional prohibition against cruel and inhuman punishment." 16 USCMA at 641, 37 CMR at 261 (Kilday, J., concurring). As early as 1955 an Air Force Board of Review ruled in *United States* v. *Walker,* 20 CMR 931, that a particular punishment was "prohibited by the 'cruel and unusual punishment' provisions of both the Constitution of the United States and the Uniform Code of Military Justice." *Id.,* at 935.

Further, although the general disuse of the death penalty in the military has precluded USCMA's considering any death penalty cases since *Furman* v. *Georgia,* USCMA has cited *Furman* in connection with the trial of a serviceman under Article 134, 10 U.S.C. § 934, for a violation of 18 U.S.C. § 794(a), which prior to *Furman* was a capital offense (and therefore not triable under Article 134). Thus, USCMA has directly relied on *Furman* at least to the extent that it has justified expansion of military jurisdiction under Article 134.[1] *Wood* v. *McLucas,* 22 USCMA 475, 47 CMR 643 (1973).

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[1] There would undoubtedly be a greater number of military decisions relying exclusively on the Eighth Amendment were it not for the existence of a roughly parallel prohibition in Article 55 of the UCMJ. Military courts are more inclined to cite Article 55 not only because that obviates the need to rule on a constitutional ground, but because the Article 55 prohibition against cruel and unusual punishment is broader than the Eighth Amendment. United States v. Wappler, 2 USCMA 393, 396, 9 CMR 23, 26 (1953); pp. 15-16, *infra.*

In addition to military appellate court rulings, *Furman* v. *Georgia* has also been applied by military judges, lawyers, and commanders in the field.[2]

Third, civilian and military federal courts, including the United States Supreme Court, have repeatedly made clear that the Bill of Rights is, with narrow exceptions not here relevant, applicable to members of the armed forces. In *Burns* v. *Wilson,* 346 U.S. 137 (1953), which established the prevailing standard for the scope of civilian review, the Court stated that "military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights." *Id.,* at 142. Although the Court issued four separate opinions reflecting differing views on the appropriate scope of review, none quarrelled with the underlying thesis that the constitutional rights at issue applied to the military.

This statement simply reiterated what the Supreme Court had evidenced in previous decisions. In *Wade* v. *Hunter,* 336 U.S. 684, *rehearing denied,* 337 U.S. 921 (1949), for example, the Supreme Court decided whether interruption and re-referral of an Army court-martial in Germany had violated the accused serviceman's Fifth Amendment protection against double jeopardy. Although divided on the merits, the Court was agreed on the implicit premise that the double jeop-

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[2] *E.g.,* United States v. Billy Dean Smith, CM 429555, Fort Ord, California (military judge granted defense counsel motion that case be treated as non-capital on grounds that Furman v. Georgia is binding on the military); United States v. Kenneth Herrington, CM 432012, Fort Hood, Texas (on basis of defense counsel brief arguing that Furman v. Georgia prohibited referral as a capital case, convening authority, contrary to pretrial advice from his staff, referred case as non-capital).

ardy clause of the Fifth Amendment applies to the military. *Id.*, at 690, 692. *See also Trop* v. *Dulles, supra.*

All courts, civilian and military, agree that the Fifth Amendment right to indictment by grand jury and the Sixth Amendment right to trial by jury do not apply to the military.[3] In delineating the exceptions, however, the Supreme Court has indicated that they do not include the Eighth Amendment ban on cruel and unusual punishments. In *O'Callahan* v. *Parker,* 395 U.S. 258 (1969), in which the issue was the limits of military subject matter jurisdiction, the Court confirmed the exclusion of the grand jury and petit jury provisions and observed that within the limits of military jurisdiction criminal defendants are deprived of these constitutional rights. Emphasizing the constitutional implications of its ruling, the Court emphasized that "[*t*]*hose civil rights* [grand jury indictment and jury trial] are the constitutional stakes in the present litigation." *Id.,* at 262. The serviceman's Eighth Amendment protection against cruel and unusual punishment, significantly, was not.

Numerous lower federal courts have paralleled and followed Supreme Court and USCMA decisions by applying provisions of the Bill of Rights—except for the Fifth and Sixth Amendment grand jury indictment and jury trial provisions — to citizens in the armed forces. Although courts have sometimes refrained from passing on constitutional questions on

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[3] Whelchel v. McDonald, 340 U.S. 122 (1950), *rehearing denied,* 340 U.S. 923 (1951); Reid v. Covert, 354 U.S. 1 (1957); Kahn v. Anderson, 255 U.S. 1 (1921); Ex parte Quirin, 317 U.S. 1 (1942); United States v. Tempia, 16 USCMA 629, 37 CMR 249 (1967); United States v. Burney, 6 USCMA 776, 796, 21 CMR 98, 118 (1956).

grounds of limited scope of review,[4] the body of case law reflecting the applicability of the Bill of Rights to the military is nevertheless substantial. Federal courts have tested the constitutionality of actions by military courts-martial and authorities against numerous provisions of the Bill of Rights. The case law is extensive.[5]

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[4] Lower federal courts have applied a number of varying interpretations of the "fully and fairly" scope of review standard announced in Burns v. Wilson, *supra*. Under some of these variants courts have declined to pass on the merits of constitutional claims. *See generally* H. Moyer, *Justice and the Military*, §§ 6-330 to 6-350 (1972).

[5] Illustrative are Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965) (Fifth Amendment due process, Sixth Amendment right to counsel); Relford v. Commandant, 409 F.2d 824 (10th Cir. 1969), *aff'd*, 401 U.S. 355 (1971) (Fifth Amendment self-incrimination—line up, confession); Kauffman v. Secretary of Air Force, 415 F.2d 991 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970) (Fourth Amendment search, Fifth Amendment self-incrimination); Easley v. Hunter, 209 F.2d 483 (10th Cir. 1953) (Fifth Amendment due process, Sixth Amendment right to confrontation, Eighth Amendment cruel and unusual punishment); United States ex rel. Innes v. Hiatt, 141 F.2d 664 (3d Cir. 1944) (Fifth Amendment due process); Sanford v. Robbins, 115 F.2d 435 (5th Cir. 1940), *cert. denied*, 312 U.S. 697 (1941) (Fifth Amendment double jeopardy); Kasey v. Goodwyn, 291 F.2d 174 (4th Cir. 1961), *cert. denied*, 368 U.S. 959 (1962) (Fifth Amendment due process—pretrial publicity); Harris v. Ciccone, 417 F.2d 479 (8th Cir. 1969), *cert. denied*, 397 U.S. 1078 (1970) (Sixth Amendment right to counsel, right to be informed of charges); Burns v. Lovett, 202 F.2d 335 (D.C. Cir. 1952), *aff'd sub nom*, Burns v. Wilson, 346 U.S. 137 (1953) (Fifth and Sixth Amendment rights except for jury provisions); McCurdy v. Zuckert, 359 F.2d 491 (5th Cir.), *cert. denied*, 385 U.S. 903 (1966) (Fifth Amendment due process); Suttles v. Davis, 215 F.2d 760 (10th Cir.), *cert. denied*, 348 U.S. 903 (1954), *rehearing denied*, 385 U.S. 932 (1955) (Fifth Amendment due process); Shapiro v. United States, 69 F. Supp. 205 (Ct. Cl. 1947) (Fifth Amendment due process, Sixth Amendment right to counsel—time to prepare); Augenblick v. United States, 377 F.2d 586, 593-96 (Ct. Cl. 1967), *rev'd on other grounds*, 393 U.S. 348 (1969) (Fifth Amendment double jeopardy). The examples could continue.

Even more explicit than federal court precedents is the unambiguous position of the U.S. Court of Military Appeals, which has repeatedly held that the Bill of Rights applies fully to the military except where expressly or by necessary implication inapplicable. Moreover, the Court of Military Appeals, which this Court has described as "the court to which Congress has confided primary responsibility for the supervision of military justice,"[6] has specifically reaffirmed the applicability of the Eighth Amendment ban against cruel and unusual punishment.

The Court of Military Appeals (USCMA) has long embraced the rule that

> "the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces." *United States* v. *Jacoby,* 11 USCMA 428, 430-31, 29 CMR 244, 246-47 (1960).

In *United States* v. *Tempia,* 16 USCMA 629, 37 CMR 249 (1967), the court, citing authorities dating back to 1780, explicitly rejected the contrary contention on which respondents base their present argument:

> "The time is long since past . . . when this Court will lend an attentive ear to the argument that members of the armed services are, by reason of their status, *ipso facto* deprived of all protections of the Bill of Rights." 16 USCMA at 633, 37 CMR at 253.

Focusing directly on the historical separateness which respondents here stress, the court stated:

> "That military law exists and has developed separately from other Federal law does not mean that persons subject thereto are denied their constitutional rights." *Id.*

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[6] Noyd v. Bond, 395 U.S. 683, 695 (1969).

On numerous occasions the Court of Military Appeals has reiterated this principle, and lower military courts have followed it.[7]

Also, USCMA has explicitly stated in numerous decisions that it is bound by Supreme Court rulings on provisions of the Bill of Rights. In *United States* v. *Tempia, supra,* in which it applied *Miranda* v. *Arizona,* 384 U.S. 436, *rehearing denied,* 385 U.S. 890 (1966), to the military, the court stated that

> "As the Chief Judge has noted, the views of the 'Supreme Court of the United States on constitutional issues' are binding on us." *Id.*, at 255.

Similarly, the court reiterated in *United States* v. *White,* 17 USCMA 211, 38 CMR 9 (1967), that "this Court must accept and apply decisions of the Supreme Court of the United States on constitutional questions." 17 USCMA at 216, 38 CMR at 14. Indeed a brief survey of USCMA decisions makes abundantly clear that that tribunal invariably looks to the United States Supreme Court for controlling guidance on constitutional questions.[8]

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[7] *E.g.*, United States v. Manos, 17 USCMA 10, 37 CMR 274 (1967); United States v. White, 17 USCMA 211, 38 CMR 9 (1967); United States v. Armbruster, 11 USCMA 596, 598, 29 CMR 412, 414 (1960); United States v. Alderman, 22 USCMA 298, 303, 46 CMR 298, 303 (1973); United States v. Bevilacqua, 18 USCMA 10, 11, 39 CMR 10, 11 (1968); United States v. Crawford, 15 USCMA 31, 34, 35 CMR 3, 6 (1964); United States v. Braley, 47 CMR 46, 48 n.1 (CGCMR 1973).

[8] *See, e.g.*, cases applying Supreme Court standards in the areas of search and seizure (United States v. Poundstone, 22 USCMA 277, 46 CMR 277 (1973); United States v. Garlich, 15 USCMA 362, 35 CMR 334 (1965); United States v. Ross, 13 USCMA 432, 32 CMR 432 (1963)); right to counsel (United States v. Alderman, 22 USCMA 298, 303, 46 CMR 298, 303 (1973); United States v. Gunnels, 8 USCMA 130, 23 CMR 354 (1957)); double jeopardy (United States v. Daniels, 23 USCMA 94, 48 CMR 655 (1974);

In addition, the Court of Military Appeals and other military appellate courts have made clear that the Eighth Amendment prohibition against cruel and unusual punishment is not one of the constitutional exceptions which does not affect the military. To the contrary, as early as 1956 the Court of Military Appeals stated that:

> "Once a person is held to be subject to military law, and is tried by a court-martial, every right and privilege guaranteed to any citizen by the Constitution is granted him by the Uniform Code of Military Justice, with the exception of a trial by jury and a presentment of a grand jury." *United States* v. *Burney,* 6 USCMA 776, 796, 21 CMR 98, 118 (1956).

Later the same year Judge Quinn, who served as Chief Judge of the court for its first 20 years, reiterated this guiding rule, stating that servicemen are "entitled to all the rights and privileges accorded to civilians, except the right to an indictment by a grand jury, which is expressly excluded by the Constitution itself, and trial by jury, which is excluded by necessary implication." *United States* v. *Brown,* 7 USCMA 251, 260, 22 CMR 41, 50 (1956) (Quinn, J., concurring).[9]

United States v. Richardson, 21 USCMA 54, 44 CMR 108 (1971)); right of confrontation (United States v. Jacoby, 11 USCMA 428, 29 CMR 244 (1960)); acceptance of guilty pleas (United States v. Care, 18 USCMA 535, 40 CMR 247 (1969)).

[9] Nor may this view be regarded as an alien proposition, for military authorities have themselves long espoused the view that constitutional protections apply to members of the armed forces. In 1920 the Judge Advocate General of the Navy stated that

> " 'all the amendments are applicable to persons in the land and naval forces in letter as well as in spirit, except the sixth amendment, and so much of the fifth amendment as relates to presentment or indictment by a grand jury." I Navy De-

Fourth, as the foregoing case law suggests, respondents' argument runs counter to the basic policy that underlies the development of military law over the past several decades. Through the decisions of the Court of Military Appeals and civilian federal courts, the undeviating trend has been toward greater similarity between civilian and military criminal justice systems, toward more rather than less complete protection of constitutional rights. As one prominent commentator and champion of military justice stated in 1961,

> "our policy should not be to maximize [the differences between soldiers and civilians] so far as that can be done without outraging the courts' sense of justice, but rather to minimize them so far as that can be done without impairing military efficiency." Bishop, *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions,* 61 Colum. L. Rev. 40, 71.

This view and its embodiment in federal court decisions over the past 25 years is consistent with, and has been reinforced by, Congress' express endorsement

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partment, Compilation of Court-Martial Orders for the Years 1916-1937, at 595, 597 (1940); as cited in Wiener, Courts-Martial and the Bill of Rights: the Original Practice II, 72 Harv. L. Rev. 266, 300-01 (1958).

Similarly, in testimony before the Senate Subcommittee on Constitutional Rights in 1962 the Assistant Judge Advocate General of the Army stated:

> "The Department of the Army and the Judge Advocate General believe that the intent of Congress that the protections of the Constitution of the United States extend to the members of the Military Establishment has become a reality. We welcome the opportunity to discuss the constitutional safeguards extending to each of us in the military service." *Hearings on Constitutional Rights of Military Personnel Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 87th Cong., 2d Sess., at 99 (1962).

of the same view. The enactment of the Uniform Code of Military Justice in 1950 was a landmark congressional mandate to increased similarity between military and civilian criminal systems.[10] Numerous provisions of the new Uniform Code paralleled, and in some instances surpassed, prevailing constitutional guarantees.[11] As discussed above, the civilian Court of Military Appeals, also a creation of the UCMJ, has carried out the mandate Congress laid down. Further, since 1950 Congress has twice amended the Code, effecting in each instance changes further reducing the contrasts between civilian and military criminal justice systems.[12] This coalescence of congressional enact-

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[10] *See, e.g.*, F. B. Wiener, *The Uniform Code of Military Justice*, (1950); Morgan, *The Background of the Uniform Code of Military Justice*, 6 Vand. L. Rev. 169 (1953); Ward, *UCMJ—Does It Work?*, 6 Vand. L. Rev. 186 (1953); Sherman, *The Civilianization of Military Law*, 22 Maine L. Rev. 3 (1970); Comment, *The Uniform Code of Military Justice—New Rights and a Means to Enforce Them*, 50 Mich. L. Rev. 1084 (1952); Note, *The Proposed Uniform Code of Military Justice*, 62 Harv. L. Rev. 1377 (1949).

[11] The UCMJ confers upon servicemen the right to a speedy trial (art. 10, 10 U.S.C. § 810, art. 33, 10 U.S.C. § 833), the right to be informed of the charges (art. 10, 10 U.S.C. § 810, art. 35, 10 U.S.C. § 835), right to counsel (art. 27, 10 U.S.C. § 827, art. 38, 10 U.S.C. § 838, art. 70, 10 U.S.C. § 870), right to confront witnesses (art. 30, 10 U.S.C. § 830, art. 46, 10 U.S.C. § 846, art. 49, 10 U.S.C. § 849), protection against double jeopardy (art. 44, 10 U.S.C. § 844), right against self-incrimination (art. 31, 10 U.S.C. § 831), right to obtain witnesses (art. 46, 10 U.S.C. § 846), and protection against cruel and unusual punishments (art. 55, 10 U.S.C. § 855). As construed by USCMA, some of these rights, most notably the right to speedy trial, and the right against self-incrimination, have proved significantly broader than parallel constitutional protections.

[12] *See, e.g.*, Douglass, *The Judicialization of Military Courts*, 22 Hast. L.J. 213 (1971); Mounts & Sugarman, *The Military Justice Act of 1968*, 55 A.B.A.J. 470 (1969).

ments, military court decisions, and civilian court decisions clearly marks the pattern of development of modern military law.[13] In this context, a decision adopting the argument respondents now submit would be an anomalous throwback.

Fifth, respondents' position is not supported by this Court's recent decision in *Parker* v. *Levy,* 42 U.S. L.W. 4979 (June 19, 1974). *Levy,* which is the only case respondents cite in support of their argument on this point, involved the constitutional standards to be applied in judging the requisite specificity of statutes prescribing substantive military offenses. Petitioner in *Levy* challenged, in the face of long-standing precedents to the contrary in the Court of Military Appeals, the constitutionality of articles 133 and 134 of the UCMJ (10 U.S.C. §§ 933, 934), articles which incorporate a minimum of 67 specific offenses. At issue, here, by contrast, is the applicability of a constitutional rule to a single punishment which none of the armed forces has invoked for over a decade, a decade which spans the longest military engagement in our nation's history. As civilian and military courts have repeatedly shown, the one generalized quotation respondents lift from *Levy* has no bearing on the inquiry in case.

Sixth, even casual scrutiny of the factual contentions on which respondents base their suggestion that the rationale of *Furman* is inapplicable to the military

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[13] The recent history of military justice has been extensively chronicled. *E.g.,* Quinn, *The United States Court of Military Appeals and Military Due Process,* 35 St. John's L. Rev. 225 (1961); Willis, *The Constitution, The United States Court of Military Appeals and the Future,* 57 Mil. L. Rev. 27 (1972); Sherman, *The Civilianization of Military Law, supra;* Douglass *The Judicialization of Military Courts, supra;* H. Moyer, *Justice and the Military,* §§ 2-103 to 2-108 (1972).

shows them to be wholly baseless. Because servicemen must sometimes carry weapons, serve abroad during wartime, and obey combat orders, respondents argue, the death penalty "may be" more necessary and appropriate than in a civilian setting (Br. 20). Apart from the fact that none of the special factors cited by respondents was present in the case of Schick, this contention is hollow when considered in conjunction with actual military experience. That the maintenance of military discipline requires imposition of the death penalty is belied by the experience of the Army, for the Army has not executed a serviceman in more than a decade, despite extensive combat involvement overseas. The Air Force has executed only two servicemen during its entire history and none under the Uniform Code of Military Justice. And the Navy and Marine Corps have not executed a serviceman since 1849. Indeed, in the Marine Corps, whose tradition of discipline is world renowned, no court-martial has even adjudged a death sentence at the trial level for well over a century. Against these facts, the claim that military discipline is dependent on the death penalty can hardly be taken seriously.

The contention that special military requirements exempt the military from the constitutional ban on cruel and unusual punishments is especially anomalous in light of Article 55 of the UCMJ, 10 U.S.C. § 855, which contains a parallel prohibition. This provision is fully as protective as the Eighth Amendment. In *United States* v. *Wappler,* 2 USCMA 393, 9 CMR 23 (1953), decided just three years after the enactment of the UCMJ, the Court of Military Appeals defined the scope of Article 55:

> "Certainly Congress intended to confer as much protection as that afforded by the Eighth Amend-

ment. Additionally—at least to the extent of including the punishment involved here—we believe it intended to grant protection covering even wider limits." *Id.*, at 26.

Thus, the proposition now forwarded by respondents is made in the face of a judgment by Congress to the contrary. Indeed, regulations promulgated by the Army itself prohibit the imposition of cruel or unusual punishments.[14]

In addition, respondents assert that the military appellate review process provided by statute prevents "discriminatory or wanton" use of the death penalty (Br. 21). The bald assertion, for which respondents offer no support whatever, is flatly contradicted by fact. Blatant differences among the services themselves are obvious. While the Army executed nearly 150 servicemen during the decade spanning World War II, neither the Marine Corps nor the Navy has executed a single serviceman for over a century and a quarter. Also, contrary to respondents' assertion, imposition of the death penalty in the military has impacted disproportionately against minorities. Of the 12 servicemen executed since 1950, at least 8, and perhaps as many as all 12,[15] were black. Moreover, certain institutional factors unique to the military system of justice increase the likelihood that the death penalty will be applied more irrationally and inconsistently in a military setting than in a civilian one. Judicial processes in

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[14] Headquarters, Department of the Army, Army Reg. 190-4, ¶ 2-2(d)(8), at 2-3 (1969).

[15] Both executed members of the Air Force were black. Six of the ten men executed by the Army are known to have been black. Prior to filing this brief, neither counsel for petitioner nor the Army, which furnished its assistance, had been able to identify the race of the remaining four.

the military may, for example, be distorted by the presence or fear of command influence. This possibility is heightened where, as in this case, the victim of the crime is the daughter of a senior Army officer. Conversely, the phenomenon of reverse command influence may favor the accused where, as in the *Calley* case, the accused, like the jury and reviewing authorities, is a commissioned officer. (No commissioned officers were, for example, among the 12 servicemen executed since 1950.) *See generally* H. Moyer, *Justice and the Military* §§ 3-300, 3-301. Military trials may also be under unique pressures where, as in *United States* v. *Day*, 2 USCMA 416, 9 CMR 46 (1953), and *United States* v. *Bennett*, 7 USCMA 97, 21 CMR 223 (1956), the court-martial is convened in a foreign host nation and the victim is a foreign national of that country.

Moreover, the pattern of actual executions in the military conclusively dispels any notion that the military review system ensures rational or systematic use of the death penalty. To select only a few of many possible examples, the appellate filter which respondents cite has approved the execution of an Army private convicted of a single count of murder,[16] but produced a sentence of only 20 years for the murder of five unarmed Vietnamese, one of whom the accused killed by hanging him, cutting his throat with a knife, stabbing him, throwing him into a stream, and detonating grenades on top of him.[17] The same system affirmed the execution of an Army PFC convicted of rape and attempted

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[16] United States v. O'Brien, 3 USCMA 105, 11 CMR 105 (1953).

[17] *See* Allen v. VanCantfort, 436 F.2d 625, 627-28 (1st Cir.), *cert. denied*, 402 U.S. 1008 (1971).

murder where the victim lived,[18] but produced a sentence of *one year* in confinement for the murder of several Oriental civilians.[19] The examples could continue.

Finally, there is no basis, in light of the foregoing authority, for respondent's suggestion (Br. 21) that this case be remanded for an evidentiary hearing. Where the government has raised in its brief on the merits a major new constitutional argument not previously made in this case, and where respondents ask this Court to accept their argument over an established body of contrary precedents on grounds that are demonstrably baseless, an evidentiary hearing would serve no purpose. The issues of this case, which has been in litigation for more than three years, do not turn on unresolved questions of fact.

B. The Retrospective Application of Furman v. Georgia Reaches Petitioner's Sentence.

Emphasizing that the *Furman* decision is a product of "changing moral standards" (Br. 22), respondents argue that *Furman* does not justify "reaching back 20 years" to invalidate a commuted death penalty (Br. 23). However, the retrospective application of *Furman* has already had the effect of reaching back a substantial number of years to invalidate prior impositions of the death penalty. For example, application of the rule of *Furman* has invalidated several death penalties imposed in 1960. *See In re Baker,* 267 So.2d 331 (Fla. 1972) (sentences of Simon, Thomas, and Whitney). There is obviously no rational reason to hold that a retroactive constitutional decision goes back 14 years, but not 20.

Commenting on petitioner's argument that the President's action cannot be sustained because it has

[18] United States v. Bennett, 7 USCMA 97, 21 CMR 233 (1956).

[19] United States v. Schwarz, 45 CMR 852 (1971).

the *net effect* of increasing petitioner's sentence above the lawful maximum, respondents state that the flaw in this argument is the assumption that the death penalty was unconstitutional when originally imposed (Br. 25). Respondents misstate petitioner's argument, however, for petitioner nowhere contends that the death penalty was unconstitutional when adjudged. Rather, the argument is that, viewed in light of the retrospective application of *Furman*, the present net effect of the sentence to death and the President's commutation is to leave petitioner with a sentence greater than what has since been held, retroactively, to be the maximum lawful punishment. It is the synthesis of these various circumstances as seen in retrospect, not an assertion that President Eisenhower's action was illegal at the time he acted, which compels the conclusion that the continued imposition of a sentence above the lawful maximum cannot be sustained.

II. The President Exceeded His Constitutional Power to Commute Because the Commuted Punishment Was Not Provided by Statute.

Petitioner has argued that under prior decisions of this Court the President is without authority to commute to a novel punishment not authorized by the legislature, and with this general proposition respondents appear not to take issue.[20] Respondents argue, however, that the punishment of no-parole life imprisonment has the requisite legislative basis. When the bases for this contention are examined, however, it becomes clear that the commuted punishment at issue here is precisely the type of extra-statutory punishment that this Court's precedents prohibit.

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[20] Respondents state in their brief: "It may be, moreover, that the President cannot create novel or bizarre punishments, wholly alien to our law." (Br. 12.)

Petitioner's sentence was commuted to a punishment that was not provided by law for the punishment of *any* offense proscribed by the Uniform Code of Military Justice. Moreover, the punishment was to be found nowhere in the United States Code. In short, it was at the time a punishment completely unknown to federal law, both military and civilian. Respondents nonetheless argue that this punishment was not new, pointing to the pre-1910 absence of a parole statute, state statutes, and 21 U.S.C. 848(a), (c). None of these examples supports respondents. Reference to punishments permitted at various times in our country's past is obviously inapposite; surely respondents would not contend that commutation to denationalization would be permissible because it was "known to the law" prior to *Trop* v. *Dulles, supra.* Likewise, punishments prescribed by state codes, most of which petitioner was never subject to, are no more relevant to his case than are criminal codes of foreign countries. And reference to 21 U.S.C. 848(a), (c) is clearly irrelevant, for that provision was not in existence at the time petitioner was sentenced or at the time the President commuted his sentence. Indeed, that provision was enacted in 1970, some ten years *after* the President's commutation. Finally, respondents' argument that no-parole life is not unprecedented because many prisoners die in prison before their terms expire is, we submit, frivolous.

Apart from the foregoing, most of respondents' argument is made against a point that petitioner does not assert, namely, that the President can commute only to a lesser punishment provided by statute *for the offense of which the accused was convicted.* Using this as a point of departure, respondents then argue that

the limits petitioner urges would unacceptably restrict the President's power where an accused is convicted of an offense for which the prescribed punishment is a specified range of years or mandatory death. Petitioner has not, however, argued that the President would be so fettered,[21] and this result need not follow from the limitation implied by previous decisions of this Court.

Ex parte Wells, 59 U.S. (18 How.) 307, 313 (1855), states that the King[22] could not commute to an alternative lesser punishment unless that punishment was "provided by legislation." This limitation might be construed in two ways: that the chief executive could substitute only lesser punishments provided by legislation for the particular offense committed, or that he could commute only to those types of punishments that the legislature had authorized generally as criminal punishments. Although applicable precedent could be read, as respondents have assumed in their brief, to impose the former, more restrictive limitation, even this would not necessarily bar simple commutation to lesser terms of confinement in the hypotheticals respondents cite.[23] This limitation could be read, we

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[21] *Cf., e.g.,* petitioner's argument that relevant authority requires that the lesser punishment must be "authorized by law" (Pet. Br. 2), known "to the criminal code" (Pet. Br. 24), "not . . . foreign to the system of criminal law under which the prisoner was tried" (Pet. Br. 25), within "the statutory framework" (Pet. Br. 26), and must have "some statutory basis" (Pet. Br. 32).

[22] The executive clemency power in Article II, Section 2 of the Constitution was taken from English practice and incorporated English principles and rules concerning the exercise of that power. United States v. Wilson, 32 U.S. 94, 101-02, 7 Pet. 150, 160 (1833); Ex parte Wells, 59 U.S. (18 How.) 307, 312-13 (1855).

[23] Respondents cite Biddle v. Perovich, 274 U.S. 480 (1927), in support of their position. However, in that case, in which the Court ruled that a substitute punishment must be authorized by

submit, to permit the President to commute sentences of death and imprisonment to a lesser term of imprisonment, the punishment that has been central to our jurisprudence throughout our history and which has continually been legislatively sanctioned. What this limitation would prohibit, however, is the President's commuting to some other, specialized punishment prescribed only for a particular or specific type of offense.

The facts of this case, however, do not require the Court to decide whether statutory authority must be found within the statute proscribing the offense. The precedents petitioner has previously cited clearly proscribe imposition of a punishment not prescribed for *any* offense in the criminal code. This case involves just such a non-statutory punishment and can therefore be decided on this narrower ground.

CONCLUSION

For the foregoing reasons and the reasons stated in the Brief for the Petitioner, the no-parole portion of petitioner's commuted sentence should be declared invalid.

Respectfully submitted,

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law, the Solicitor General made precisely the same argument petitioner here makes: that the validity of the substituted punishment depends on its "being one authorized and provided by law as opposed to one invented or devised by the pardoning power." Brief for the Warden, p. 37.